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No. 04-52

IN THE SUPREME COURT OF THE UNITED STATES

BERTRAM RICE, WARDEN, *Petitioner,*

v.

STEVEN MARTELL COLLINS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Does 28 U.S.C. § 2254 allow a federal habeas corpus court to reject the presumption of correctness for state-court fact-finding, and condemn a state-court adjudication as an unreasonable determination of the facts, where a rational fact-finder could have determined the facts as the state court did?

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PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The Ninth Circuit Court of Appeals' opinion is reported as *Collins* v. *Rice*, 348 F.3d 1082 (9th Cir. 2003), modified and superseded on denial of rehearing, 365 F.3d 667 (9th Cir. 2004); it is reprinted in the Joint Appendix (JA) at pages 23 et seq. The judgment and order of the district court, and the magistrate's report and recommendation that the district court adopted, are unreported; each is reprinted in the appendix to the petition for writ of certiorari (App. to Cert. Pet.) at pages 91-107. The opinion of the California Court of Appeal is unpublished, and is reprinted in the appendix to the petition for writ of certiorari at pages 109-120.

JURISDICTION

The court of appeals filed its opinion and judgment on November 7, 2003; and it denied, on April 8, 2004, a timely petition for rehearing filed by petitioner Rice (the State). The

State filed a timely petition for writ of certiorari on July 7, 2004. This Court granted that petition on June 28, 2005, and has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 2254 of Title 28 of the United States Code provides, in pertinent part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

* * * *

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

1. In California in 1996, the police arrested respondent Steven Collins pursuant to a warrant and discovered .10 grams of rock cocaine in his possession. App. to Cert. Pet. 110. The State charged respondent, as a recidivist under California's Three Strikes Law, with felonious possession of the cocaine. JA 76-76.

2. At respondent's trial, the judge conducted voir dire of the prospective jurors. JA 70 et seq. "Juror 16," an African-American woman, responded to the judge's questions by stating

that she lived in Inglewood; that she was single and had no children; that she worked as a clerk for the federal government; that she had no reason to believe there were drug dealers active in her neighborhood; that she had no prior jury experience; that she understood the concepts of "presumption of innocence" and "burden of proof"; and that there was nothing about the nature of the case that would make it difficult for her to serve on the jury. JA 139-143. "Juror 19," another African-American woman, stated that she also lived in Inglewood; that she was a retired nurse; that she was single but had seven grown children, including a daughter who herself had five children; that she had no reason to believe there were drug dealers active in her neighborhood; that her daughter at one time had a problem with drugs and that she was involved in helping her, but that she had "no idea" what kind of drug was involved, although she thought it was cocaine; that she did not "think" her daughter had ever been arrested or accused of committing a drug offense; and that the fact of her daughter's drug experience would not affect her ability to be impartial as a juror. JA 155-160.

Later in the course of jury selection, the prosecutor exercised four peremptory challenges, the third against Juror 16 and the fourth against Juror 19. Relying on the California case of *People* v. *Wheeler*, 22 Cal.3d 258, 583 P.2d 748 (1978), defense counsel objected that the prosecutor had impermissibly exercised the challenges against Jurors 16 and 19 on account of their race. In response, the prosecutor pointed out that she had excused "two white people and two African-American people" and stated that there still remained two "people of color, African-American type" in the jury box. Reporter's Transcript [RT], People v. Collins, Los Angeles Superior Court Case No. YA028034 [lodged under seal], 66 et seq.

Finding a "prima facie case," however, the judge asked the prosecutor to explain her reasons for the two challenges. RT 66. The prosecutor responded,

> Ms. 016 as well as Ms. 019 [sic] were both young and I was concerned with them being too tolerant for this type of case. [¶] Also, Ms. 016 made a remark when the judge made a response to her comment "uh-huh," she turned away and rolled her eyes. I don't think you asked her specifically to give a yes or no, but she went "yes," and rolled her eyes and turned away from the court. [¶] She and Mr. 006 were both single, no ties.

RT 66-67. The prosecutor identified Juror 6 in this comparison as one of the white jurors she had challenged. RT 67. In voir dire, Juror 6 had stated, "I live in Torrance. I am single; never employed; no prior jury experience"; he also had reported that his uncle was a recovering alcoholic. JA 108, 126. Summing up on Juror 16, the prosecutor said, "That was the reason, the justification for excusing her, rather than her being an African-American." RT 67.

Focusing next on Juror 19, the prosecutor continued,

> 019, she also had a daughter having a drug problem and she talked about not knowing much about what drug it was, things like that. She was not sufficiently educated in some areas to decide a case like this. But it is beyond any of her experience.

RT 67.

After pausing to excuse the prospective jurors from the courtroom, the judge resumed the hearing by asking the prosecutor whether she had any further reasons for the peremptory challenges. The prosecutor answered by noting that Jurors 16 and 19 were women and that respondent Collins was a man; and she again remarked that there remained in the jury box both a "male African-American" and a "second female juror that is of African-American color, black color." RT 68. "That is it, your Honor, at this point," the prosecutor said. *Id.* But she offered to supply the judge with "cases for those types

of challenges as being upheld in other courts, age and gender and inexperience with a certain subject area." *Id.* at 68-69.

In response to the prosecutor, defense counsel opined that Juror 19 was not required to have "a whole lot of clinical knowledge" about her daughter's drug problem and that she wisely had ensured that her daughter received help without getting "clinically involved" with the treatment. RT 69-70. Defense counsel further contended that the prosecutor, if dissatisfied with Juror 19's answers, should have asked the judge to ask the juror more questions. RT 70. As for Juror 16, defense counsel stated, "Certainly, the fact that Ms. 016 was young, I don't think the prosecutor can pick and choose jurors just by saying I want more male-female balance or I want more older people." RT 70. In addition, defense counsel disputed whether the "woman of color" remaining in the jury box was African-American. According to defense counsel, "two African-American jurors—and my client, for the record, is African-American—have been removed without any obvious valid reasons." *Id.*

The judge asked whether the prosecutor could cite any authority for the proposition that sex was a proper criterion for a peremptory challenge. RT 70. The prosecutor mentioned that "People v. Ortega" had spoken of "the jury being balanced between young and old and men and women."[1] *Id.* The judge responded that the United States Supreme Court had disallowed peremptory challenges based on a juror's sex. He then stated, "I don't see * * * that you are seeking to justify excusing people of one ethnicity because of their gender. That isn't going to cut it." RT 71. The prosecutor replied,

> I think I tied that into a lack of ties in the community for both of them; that was one factor that I considered, that is, the

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1. *People* v. *Ortega*, 156 Cal.App.3d 63, 202 Cal.Rptr. 657 (Cal Ct. of App. 1984), seemed to approve some peremptory challenges exercised on grounds other than race to promote a jury balanced in terms of sex and age.

> manner in which I stated that they could—that their youth was important. It was not that I don't want any young people on the jury. There are, I believe, other young people on the jury.

RT 71. After explaining, "I am not talking about youth versus age," the judge then ruled as follows:

> Evaluating the district attorney's stated justifications for the exercise of peremptory challenges against prospective jurors numbers 019 and 016, beginning with 019, the court is satisfied that at least one race and gender neutral explanation was offered for the exercise of that peremptory challenge, that being Ms. 019's experiences with a family member who had a drug problem. [¶] With regard to 016, the court, frankly, did not observe the demeanor of Ms. 016 that was complained of by the district attorney; however, Ms. 016 was a youthful person, as was 006. And one or more of the prospective jurors also. The court is prepared to give the district attorney the benefit of the doubt as to Ms. 016. [¶] So the motion under the *Wheeler* case is denied at this time; however, that is without prejudice to your ability to renew the same, [defense counsel], should you feel it appropriate to do so. [¶] Both parties are reminded that if the court does grant a *Wheeler* motion, the court is required to report its reasons to the State Bar of California.

RT 71-72.

Jury selection continued. JA 186. Respondent's lawyer and the prosecutor each exercised, without objection, one more peremptory challenge. Each side then accepted the jury. JA 191, 199. An alternate juror was chosen, with the prosecutor refraining from exercising any more challenges.[2/] JA 210-214.

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2. The racial composition of the jury selected at the start of trial is not fully apparent from the record. None of the prospective jurors identified themselves by race in the voir dire. But, judging from the comments of the prosecutor and defense counsel, it can be deduced that at least one or two (Jurors 3 and 20) were African-American. It appears that nine of the jurors were women, and that at least three were men: Jurors 2, 4, 5, 15, 17, 18, 20, 26, and 30, each gave answers identifying themselves as women or had been addressed by the trial judge with a female honorific; and Jurors 3, 28, and 31, had identified themselves as men. JA 101, 106-108, 142-143, 151-152, 161, 180, 188-189, 195, 199, 200-201. The record provides no direct evidence of the race or the sex of the alternate juror.

3. In the ensuing trial, the jury found respondent guilty as charged. App. to Cert. Pet. 109-110. The court sentenced him to imprisonment as a recidivist for twenty-five years to life. *Id.*

4. Respondent appealed, claiming that the trial judge had erred under *People* v. *Wheeler* and the federal constitutional rule of *Batson* v. *Kentucky*, 476 U.S. 79 (1986)—but only in overruling his objection to the prosecutor's challenge to Juror 16. Respondent argued that he had made out a prima facie case of a *Wheeler-Batson* violation on account of the prosecutor's challenge to two African-American jurors in a case involving an African-American defendant, and that the prosecutor impermissibly had excluded Juror 16 "based solely on her youthful age." App. to Cert. Pet. 190.

In a written opinion affirming the conviction, the California Court of Appeal upheld the trial judge's ruling on respondent's peremptory-challenge objection. App. to Cert. Pet. 109-120. The appellate court decided, first, that the prosecutor's reliance on a Juror 16's age as a ground for the challenge was permissible. *Id.* at 115-116. The court also ruled that, in any event, it was proper for the prosecutor to excuse Juror 16 based on her eye-rolling demeanor; and that, even though the trial judge had not witnessed the eye-rolling, it was proper for the judge to accept the prosecutor's description of the juror's demeanor as justifying the challenge. *Id.* at 116. The appellate court, further, rejected respondent's assertion that the trial judge had not engaged in a "sincere and reasoned" effort to evaluate the prosecutor's stated reasons. The court explained that

nothing in the record indicated that the judge had not approached his duty appropriately, and that the judge's conclusions therefore were entitled to "great deference on appeal." *Id.* at 116-117. The California Supreme Court declined to hear a further appeal. App. to Cert. Pet. 96.

5. Respondent then filed an application for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, in the federal district court. Again, respondent limited his *Batson* claim to the argument that he had made out a prima facie case of racial discrimination, and that the prosecutor's reliance on Juror 16's youth for the strike was itself impermissible and therefore insufficient to overcome the objection. See App. to Cert. Pet. 101. In neither his petition nor in his traverse, nor elsewhere, did he proffer any evidence other than that in the state trial and appellate record. Cf. JA 4, 9. Adopting the report and recommendation of the federal magistrate, Judge Hatter concluded that the prosecutor's asserted justifications for the peremptory challenge of Juror 16—youth and demeanor—were race-neutral; and that respondent had failed to rebut—with "clear and convincing evidence" as required by 28 U.S.C. § 2254(e)(1)—the state trial court's finding that the prosecutor's two reasons were sincere. *Id.* at 101-105. Further ruling that the decisions of the state courts were neither "contrary to" nor "unreasonable applications of" clearly-established federal law under § 2254(d), the district court denied relief on respondent's *Batson* claim and dismissed the petition. *Id.* at 97, 105.

6. Respondent appealed to the Ninth Circuit Court of Appeals. He now argued that the prosecutor had challenged Juror 16 based on race, and that the prosecutor's cited reasons regarding youth, ties to the community, and demeanor were mere pretexts. Brief of Appellant, Collins v. Rice, Ninth Circuit Court of Appeals Case No. 01-56958, 29-37. In a two-to-one opinion authored by Judge Paez and joined by Judge Thomas, the Ninth Circuit reversed the district court judgment.

Saying that the prosecutor had equated Juror 16's youth with a lack of ties to the community and tolerance for drug use, the

majority criticized the state court for "glossing over" the prosecutor's "clarification" that her reason for the challenge; the majority said that the community-ties concern was unsupported by the record and did not "relate" to respondent's drug-possession case; and it concluded that, as there was "no evidence" that Juror 16 herself was tolerant of drug use, the prosecutor's reliance of drug tolerance was "contrary" to the evidence. JA 49-52. The majority also asserted that the prosecutor's failure to challenge Juror 15—said to be a single, white juror—on the same grounds indicated that her challenge to Juror 16 was a "pretext" for racial discrimination. JA 50. Conversely, the majority rejected the prosecutor's explanation that she indeed had challenged Juror 6—another single, white juror—for the same reasons. The majority asserted that Juror 6 was different from Juror 16 in other respects. JA 50 [at fn.10].

The panel further rejected as pretextual the prosecutor's stated reliance on Juror 16's demeanor. JA 53-56. It said that there was no corroboration of the prosecutor's report that Juror 16 had disdainfully rolled her eyes at a remark by the judge. JA 60. The majority also found the prosecutor not "credible" on this score because she assertedly had "attempted to offer," and then had "abandoned" reliance upon, the juror's sex as a justification for her challenge, and because the prosecutor at one point had referred to Juror 19 as young, even though that juror was retired and a grandmother. JA 55-56.

On this basis, the majority concluded that the state trial and appellate courts, in accepting the prosecutor's stated reasons for challenging Juror 16, had engaged in an "unreasonable application" of *Batson* under 28 U.S.C. § 2254(d)(1) and an "unreasonable determination of the facts" under § 2254(d)(2); that the state appellate court was "objectively unreasonable" in ruling that the trial court had not "clearly erred" in accepting the prosecutor's justifications as "race neutral"; that the state appellate court had "unreasonably" failed to "address" the evidence cited by the panel as revealing that the prosecutor's expressed reliance on the Juror 16's age was really a pretext for

racial discrimination; that the state appellate court had "unreasonably" determined the facts when it ruled that nothing in the record showed that the trial judge had failed to undertake a "searching inquiry" into the prosecutor's professed reasons for the challenges; and that the state appellate court had "unreasonably applied" *Batson* in ruling that the trial judge had fulfilled his "duty." JA 48-49, 52, 54, 56, 60, 61. In addition, the majority concluded that "clear and convincing evidence," as required by § 2254(e)(1), demonstrated: that there was "no basis" to dismiss Juror 16 on account of youth or demeanor; that the prosecutor's explanations were pretexts for challenging Jurors 16 and 19 on the basis of race; and that the state appellate court's ruling had been based on an "unreasonable determination" of the facts. JA 54, 56, 57, 58.

In dissent, Judge Hall criticized the majority for failing to defer to the state appellate court's reasonable conclusions as required under 28 U.S.C. § 2254. JA 62. In Judge Hall's view, the majority improperly had drawn unnecessary adverse inferences about the prosecutor's credibility without regard to the many reasons that supported the credibility determination of the state judge who had observed the prosecutor's demeanor. JA 62-63. Thus, Judge Hall rejected the majority's reliance on the prosecutor's statement about Juror 19's age, dismissing it as a slip of the tongue. JA 63-64. Her dissent also explained that, even if the prosecutor's reference to gender were arguably improper, the state judge had properly credited other valid reasons for the peremptory challenges. JA 64-65. Finally, Judge Hall characterized as untenable the majority's belief that it is "implausible or fantastic" to believe that young jurors might be less willing than their older counterparts to endorse harsh sentences for drug possession. JA 67.

7. The Ninth Circuit denied rehearing and hearing en banc. Judge Bea—joined by Judges Kleinfeld, Gould, Tallman, and Callahan—dissented from that denial. JA 29 et seq. In their view, the panel majority had failed to review the record with deference to the state court findings, and instead had

"nitpicked" the record and disregarded the evidence supporting the state-court findings. Addressing the prosecutor's description of Juror 19 as young, Judge Bea's dissent discerned that "it appears that everyone in that room knew that the prosecutor meant to compare Juror 016 to Juror 006." JA 30 [& fn. 2]. The dissent also criticized as "irrational" the panel majority's view that the prosecutor's statement about Juror 16's eye-rolling conduct could not be accepted unless the trial judge himself had observed it. All that mattered was whether the prosecutor was telling the truth; and the trial judge, who had observed her demeanor, was in the best position to discern that. JA 31.

The five-judge dissent criticized the two-to-one panel opinion for ignoring the "spirit, if not the letter" of § 2254(d). The panel had "substitute[d] its own inferences drawn from the cold record for the perspectives of the trial court and the state appellate court" and then improperly had "insist[ed] that any perspective other than its own must be unreasonable." JA 34.

SUMMARY OF ARGUMENT

The California courts accepted, as truthful, the permissible race-neutral reasons offered by the prosecutor for her peremptory challenge to African-American Juror 16 in compliance with *Batson* v. *Kentucky*. Under 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the state courts' resolution of that factual question was binding in the federal habeas corpus court and precluded relief on respondent's *Batson* claim. For the state-court determination was supported by substantial evidence so that a "rational" fact-finder could have rejected respondent's bare allegation that the prosecutor instead had challenged the juror on account of her race.

1. Even before AEDPA, Congress had left little room for federal courts to reject state judicial findings of historical fact, especially those based on the credibility of witnesses observed

by the state court. State-court fact determinations often were "presumed" to be correct, and a petitioner could overcome the presumption only by presenting "convincing" evidence that the state court's finding was wrong. Federal review of state-court findings was intended to be no more intrusive than the deferential review applied by federal appellate court to federal district-court findings. And, in the words of this Court, the federal courts had "no license" to re-determine the credibility of witnesses who had appeared only in the state court.

a. In AEDPA, Congress reformed habeas corpus to tighten the restrictions on the writ. Central to Congress' reforms, § 2254(d) and (e) enhanced the primary role of state courts in fact-finding and strengthened the preclusive effect of their fact determinations. Section 2254(d)(2), which presumptively bars relief on any claim rejected on the merits by the state court, prevents second-guessing the state-court's findings of the facts upon which the petitioner's claim depends, unless the state court's factual determinations were "unreasonable" in light of the evidence presented to it. As with this Court's interpretation of a similar objective "reasonableness" standard in § 2254(d)(1), the (d)(2) standard insulates state-court findings with even more protection than that afforded to comparable findings by federal trial courts. The more-forgiving standard of review for objective reasonableness comports with the standard that traditionally governs review of the sufficiency of the evidence in support of a verdict of guilt on the elements of a criminal offense. Under the (d)(2) standard, the habeas corpus court must defer to state-court fact findings if supported by "any substantial evidence" that would allow "any rational trier of fact" to decide the facts as the state court did.

b. Section 2254(e)(1) affords the state courts at least the same level of deference as (d)(2) in review of factual findings that are challenged purely on the basis of the extant state record. Strengthened by AEDPA, (e)(1) provides that state-court factual determinations now are automatically presumed correct in all cases. As the presumption no longer depends upon "fair

support" for the finding in the state record, a petitioner such as respondent cannot discharge his burden merely by second-guessing state-court fact determinations.

Instead, a petitioner now always bears the burden of rebutting the presumption with "clear and convincing"evidence. It will be a rare case in which a petitioner might meet this burden without presenting the federal court with new evidence. Nor may he meet his burden by relying on the state record if the state court findings are supported by substantial evidence so that a rational trier of fact could have found the facts the way the state court did. Where the state court adjudicated the petitioner's claim on the merits, relief on a petitioner's claim in such circumstances will be precluded under (d)(2). And it would be inherently contradictory to assert that a record which reasonable supports the state court's determinations nevertheless manifests "clear and convincing evidence" invalidating them. Separately and together, then, § 2254(d)(2) and (e)(1) provisions prohibit relief for claims based on a dispute about the facts arising solely from a state court record that rationally supported the state court's findings and resulting adjudication.

2. Here, the state court record provided the requisite rational support—and much more—for the state court's factual determination accepting as truthful the prosecutor's explanation that she had challenged Juror 16 for benign reasons. There was only the weakest of inferences of possible discrimination in the first place. The prosecutor merely had exercised two challenges against whites and two against African-Americans, and there was no "victim" of a race different from respondent's. The prosecutor's reason for challenging Juror 19—her naive statements about her daughter's drug use—were so obviously well-founded that respondent abandoned his objection to it in the state appeal long ago.

When asked to do so, the prosecutor readily provided reasons for challenging Juror 16: concerns related to the unmarried juror's youth and lack of community ties in a case involving a prosecution for a small amount of drugs, and the juror's

disrespectful eye-rolling conduct in response to a question by the judge. These reasons were race-neutral and therefore were valid under *Batson*. They also made sense. Further, to corroborate them, the prosecutor recounted that similar concern had prompted her to challenge an identified white juror too.

The judge recognized that the challenged juror and the identified white juror indeed were young. Defense counsel did not dispute the accuracy of the prosecutor's statements or their relevance to Juror 16. Because the judge conducted the voir dire, defense counsel hardly could complain that the prosecutor had asked manipulative questions of the jurors; and she never identified any comparable non-black jurors treated differently by the prosecutor.

The *Batson* question of the prosecutor's honesty "largely will turn on the question of credibility," so resolution of it is "peculiarly within a trial judge's province." Here, the trial judge was in a unique position for evaluating the demeanor of the prosecutor. He accepted the prosecutor's explanations, and the state court of appeal credited them too. The record provided no compelling grounds for rejecting those determinations. The Ninth Circuit erred in granting relief based on its mere disagreements about the facts—disagreements resulting from a "readiness to attribute error" incompatible with the deference required by AEDPA.

ARGUMENT

BECAUSE THE STATE-COURT RECORD PROVIDED RATIONAL SUPPORT FOR THE FINDING THAT THE PROSECUTOR HAD NOT CHALLENGED JUROR 16 ON ACCOUNT OF RACE, AEDPA PRECLUDES RELIEF ON RESPONDENT'S *BATSON* CLAIM

Even before the enactment of AEDPA, this Court recognized that Congress had left little room for a federal habeas corpus court to reject state-court findings of historical fact, such as that

of the honesty of the prosecutor's peremptory-challenge explanations in a claim under *Batson* v. *Kentucky*, 476 U.S. 79, especially when the findings are based on the credibility of witnesses observed by the state court. Under 28 U.S.C. § 2254, as amended by AEDPA, the federal court may not re-weigh the state-court evidence and grant relief on a claim if any rational fact-finder could have resolved the factual issues as the state court did. Here, the state record—including the explanation given by a prosecutor whose demeanor was observed by the state trial judge—provided rational support for the state court's determination accepting as truthful the prosecutor's explanation for challenging Juror 16. The Ninth Circuit Court of Appeals therefore erred under § 2254 by drawing different inferences from the same record and rejecting the prosecutor's statements as false. The Ninth Circuit's tendentious analysis, unpersuasive and unrealistic even on its own terms, resulted from a "readiness to attribute error" incompatible with the deference required by AEDPA.

I.

Under 28 U.S.C. § 2254(d) and (e), a federal habeas court may not draw different inferences and reject state court factual determinations based solely on a state-court record that provides rational support for the state court's findings.

As amended by AEDPA, the habeas corpus reforms in 28 U.S.C. § 2254(d)(2) and (e)(1) tightened the historical restrictions on the availability of the writ in cases of factual disputes. Separately and together, these provisions prohibit habeas corpus relief for challenges based on disputes about the facts arising solely from a state court record that rationally supported the state court's findings.

A. Historically, federal habeas corpus court review of state-court fact-finding and credibility determinations has been strictly minimized.

1. Prior to AEDPA, when habeas corpus deference to the state court's resolution of legal issues and "mixed" questions of fact and law was at a low ebb, see *Wright* v. *West*, 505 U.S. 277, 286-291 (1992) (plurality op.) (discussing history), this Court recognized that Congress had provided a "high measure of deference" for state-court determinations of questions of historical fact. *Sumner* v. *Mata*, 449 U.S. 539, 598 (1981). Former 28 U.S.C. § 2254(d) provided for a "presumption" of correctness for state-court factual findings if they qualified under an enumerated set of eight criteria concerning the state-court's procedures and whether the finding at least had "fair support" in the state record. A state prisoner could rebut the presumption in an "evidentiary hearing" only by presenting the federal court with "convincing" proof to the contrary.

2. In a series of opinions, this Court explicated the limits on the federal habeas courts' power to re-determine factual findings made in state court. This Court explained that the statutory presumption was not defeated when the federal court, despite ostensibly invoking the "fair support in the record" condition, rejected the state court's explicit or implicit determination of the credibility of the state-court witnesses who appeared in state court. And it emphasized that Congress had not intended to subject state-court fact-finding to review more rigorous than that permitted under the deferential standards governing fact-finding by federal trial courts.

Thus, in *Marshall* v. *Lonberger*, 459 U.S. 422 (1982), this Court reversed a federal court of appeals' decision that had granted habeas corpus relief to a state prisoner who claimed that his constitutional rights were violated by the admission of evidence of a prior criminal conviction founded on a guilty plea in which he allegedly had not been advised of the nature of the charge against him. The *Lonberger* Court disapproved the court

of appeals' decision to credit the prisoner's direct testimony—which had been at least implicitly disbelieved by the state trial judge—as its basis for rejecting the state court's factual findings as not "fairly supported by the record" under former 28 U.S.C § 2254(d). Instead, those state-court determinations "and the inferences fairly deductible" from them were binding; and they served to establish—however circumstantially—that the prisoner's plea had been intelligent and voluntary under federal standards. *Id.* at 431, 437-438.

Lonberger explained that the appropriate deference due to the state courts "requires that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations." 459 U.S. at 432. Equally fundamental, *Lonberger* recognized that "Title 28 U.S.C. § 2254(d) gives federal habeas courts *no license to redetermine the credibility of witnesses* whose demeanor has been observed by the state trial court, but not by them." *Id.* at 434 (emphasis added).

Consonant with *Lonberger,* this Court also condemned a rejection of state-court factual findings in *Maggio* v. *Fulford*, 462 U.S. 111 (1983) (*per curiam*). There, a Louisiana state judge had determined that there was no sufficient doubt warranting a formal inquiry into the defendant's competence to stand trial. *Id.* at 113-116. But the federal court of appeals dismissed the state court's factual determinations as not "fairly supported by the record" under former § 2254(d). In the court of appeals' view, uncontradicted testimony from the defendant's expert witness was persuasive and undermined the state court's finding that the last-minute motion in which the defendant had submitted the expert's testimony was a ruse to delay the trial. *Id.* at 116-117. This Court reversed, however, because the court of appeals had "erroneously substituted its own judgment as to the credibility of witnesses for that of the Louisiana courts—*a prerogative which 28 U.S.C. § 2254 does not allow it.*" *Id.* at 113 (emphasis added). Similarly, in invalidating the Ninth Circuit's rejection of state-court fact-finding in *Rushen* v. *Spain*, 464 U.S. 114, 121 n.6 (1983) (*per curiam*), this Court again

stressed that "§ 2254(d) provides that the state court's determinations about witness credibility and inferences to be drawn from the testimony were binding on the District Court and are binding on us."

Lonberger and subsequent cases also cited a further reason for according such respect to state-court factual determinations. Noting the deference federal appellate courts accord to district court factual findings based on the credibility of testifying witnesses, this Court in *Lonberger* stated, "We greatly doubt that Congress, when it used the language 'fairly supported by the record' considered 'as a whole,' intended to authorize broader federal review of state court credibility determinations than are authorized in appeals within the federal system itself." *Id.*, at 434-435. Later, *Wainwright* v. *Witt*, 469 U.S. 412, 427 & n.9 (1985), also recognized that, since federal fact finding is accorded deferential review on direct appeal, "the respect paid such findings in habeas proceedings certainly should be no less." See *Hernandez* v. *New York*, 500 U.S. 352, 369 (1991) (plurality op.) ("It would 'pervert the concept of federalism' * * * to conduct a more searching review of findings made in state trial court than we conduct with respect to federal district court findings"); see also *Francis* v. *Henderson*, 425 U.S. 536, 540 (1976) (federal habeas courts should not give lesser effect to state procedural-bar rulings than they give to federal procedural-bar rulings); accord, *Reed* v. *Farley*, 512 U.S. 339, 354 (1994).

Federal appellate review of district court fact determinations is governed, of course, by the "clear error" standard. Fed. R. Civ. Pro. 52 (a); see *Maine* v. *Taylor*, 477 U.S. 131, 145 (1986). A basic precept of "clear error" review is that "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Hernandez v. New York*, 500 U.S. at 366-369 (plurality op.) (quoting *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 575 (1985)). Further, "[w]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom

has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Anderson*, 470 U.S. at 575. As reflected in the precedents cited above, Congress even prior to AEDPA had prescribed no lesser degree of deference than that of "clear error" review for determining, under the presumption-of-correctness criteria of former § 2254(d), whether there was "fair support" in the state record for fact determinations made by the state courts.

3. This Court also endorsed deferential review of state-court findings of fact in other ways. One holds particular significance to the case at bar. On the *Batson* question that underlies the issues presented in this case—i.e., whether the prosecutor's race-neutral reasons for the exercise of a peremptory challenge were her true motivations—the plurality and concurring opinions making up the majority in *Hernandez* v. *New York*, 500 U.S. 352, endorsed deferential "clear error" federal review of the state judge's finding even on direct appeal from a state criminal judgment. *Id.* at 363-370 (plurality op.), 372 (O'Connor, J., concurring).

4. Habeas corpus review of fact-finding properly must be even more deferential than that contemplated in the "clear error" appellate rule. A habeas corpus case comes to the federal court only after the state court judgment is final on appeal, so it implicates comity and finality concerns in an intensified way. See generally *Teague* v. *Lane*, 489 U.S. 288, 305-307 (1989) (plurality op.); *Duckworth* v. *Eagan*, 492 U.S. 195, 210-211 (1989) (O'Connor, J., concurring) (habeas corpus a "flashpoint of tension" between the federal government and the States). Moreover, resolution of factual questions is most accurate when done in a timely way, and by fact-finders who benefit from observation of the testimony of witnesses. Here, anomalously, the Ninth Circuit's habeas corpus review of "cold" state-court transcripts in 2003 trumped the trial judge's observation of the voir dire and his evaluation of the prosecutor's demeanor and credibility at the very time the events occurred in 1996.

The "clear error" standard might allow a federal court an extra degree of latitude to reject a district court's determination of the credibility of a testifying witness. See *Lockyer* v. *Andrade*, 538 U.S. at 75; WRIGHT & MILLER, 9A FEDERAL PRACTICE AND PROCEDURE 565-571. But this Court's habeas corpus cases provide support for the proposition that review of such state-court findings under 28 U.S.C. § 2254(d) was even more circumscribed. As noted above, this Court more than once had stated that, under former § 2254(d), the federal court could not reject the state court's resolution of questions of the credibility of witnesses.

5. Indeed, even prior to AEDPA, this Court recognized that review for rationality or reasonableness, an inquiry even more deferential than that for "clear error," is an appropriate for factual questions in federal habeas corpus cases brought by state prisoners. Thus, in *Jackson* v. *Virginia*, 443 U.S. 307 (1979), this Court held that a state judge's findings of the factual elements of the crime for which the prisoner was committed were binding under 28 U.S.C. § 2254 if the state trial record would have allowed "any rational factfinder" to conclude that the elements had been proved under the applicable standard, beyond a reasonable doubt, in the state court. Under *Jackson*, a prisoner's challenge to the correctness of a finding of an element of the offense could not prevail if based merely upon inferences from the evidence different from a rational permissible inference in support of the finding. 443 U.S. at 318.

Further, in *Lewis* v. *Jeffers*, 497 U.S. 764 (1990), this Court held that the *Jackson* standard was applicable for reviewing fact-questions arising in state court, even in a context the Court did not consider to involve findings on the elements of a criminal offense. The *Jackson* standard was appropriate, the *Lewis* Court explained, precisely because such questions often required the state courts "to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from

basic facts to ultimate facts." *Id.* at 781 ("[I]n determining whether a state court's application of its constitutionally adequate aggravating circumstance was so erroneous as to raise an independent due process or Eighth Amendment violation, we think the more appropriate standard of review is the 'rational factfinder' standard established in *Jackson* v. *Virginia*"). See also *Parke* v. *Raley*, 506 U.S. 20, 36 (1992) (more-forgiving *Jackson* standard, rather than "fair support" standard of former § 2254(d), might be appropriate for some habeas corpus questions).

6. Such was the historical backdrop against which Congress acted when it passed AEDPA in 1996. This Court had interpreted the habeas corpus statute as supporting a level of deferential review of state-court fact-finding that at least approached if it did not attain the level of "rational" basis review, and as giving the federal courts "no license to redetermine the credibility of witnesses whose demeanor has been observed by the state trial court, but not by them." As this Court knows, the purpose of AEDPA's habeas corpus reforms was to place "more, rather than fewer, limits on the power of federal court" to grant habeas corpus relief. *Miller-el* v. *Cockrell*, 537 U.S. 322, 337 (2003); *Woodford* v. *Garceau*, 538 U.S. 202, 206 (2003); *Duncan* v. *Walker*, 533 U.S. 167, 178 (2001). In enacting AEDPA, Congress for the same purpose reformed review of state court fact-finding to make it even more deferential than before.

B. The AEDPA reforms in § 2254(d) and (e) have strengthened the preclusive effect of state-court factual determinations so that they bind the federal court unless the state record provides no rational support for the findings and "clear and convincing evidence" compels the conclusion that the state-court's findings were wrong.

Demonstrating its confidence in the state courts, Congress in enacting AEDPA enhanced the state courts' primary role in

adjudicating federal constitutional claims arising out of state criminal trials. In the area of fact-finding, Congress in 28 U.S.C. § 2254(e)(2) elevated the role of the state courts by precluding federal-court evidentiary hearings, except in rare instances, "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings."

Most pertinent here, Congress' AEDPA reforms strengthened the preclusive effect of factual determinations made in the state courts where the prime responsibility for factual development is channeled.

Thus, § 2254(d)(2) [(d)(2)] now provides,

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
> * * * *
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

In addition, Congress in AEDPA strengthened the statutory presumption of correctness for state-court factual determinations. Section § 2254(e)(1) [(e)(1)]now provides that "a determination of a factual issue made by a State court shall be presumed to be correct," and that "[t]he applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." Unlike in former § 2254(d), application of the (e)(1) presumption of correctness is now unconditional; AEDPA entirely deleted what had been eight enumerated conditions or exceptions to the presumption's operation. (Cf. [Former] § 2254(d) (1995) (presumption conditioned on "adequate" state procedures, "full and fair hearing" in state court, presence of counsel in state hearing, federal court satisfaction that determination was "fairly

supported" by the state court record, etc.").[3] And, although the sole and limited means of ultimately overcoming the presumption remains explicitly prescribed, the habeas corpus applicant's burden of rebutting the presumption has been, if anything, increased. The predecessor statute required "the applicant to establish by *convincing* evidence that the factual determination by the State court was erroneous"; the AEDPA version provides that "the applicant shall have the burden of rebutting the presumption of correctness by *clear and convincing* evidence." (Emphasis added.)

Sections 2254(d)(2) and (e)(1) work in similar ways in a case in which the habeas corpus applicant, seeking no federal evidentiary hearing to present new evidence of an alleged "clear and convincing" nature, merely seeks to second-guess the weight of the evidence upon which the state court relied in resolving the facts underlying his federal claim. Where applicable, the (d)(2) provision outright precludes claims based on fact disputes if "the evidence presented in the State court proceedings" provides a minimum level of reasonable support for the state court's findings. In light of its history and the AEDPA-enhanced effect of the "presumption of correctness" afforded to state-court fact-finding, the § 2254 (e)(1) provision similarly provides no means of overcoming rational state fact-findings by a petitioner who relies on the state record and fails to properly present the federal court with cognizable new "clear and convincing" evidence to disprove those findings. Whether applied separately or together, (d)(2) and (e)(1) compel rejection of respondent's *Batson* challenge in this case.

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3. The text of the presumption-of-correctness provision of former § 2254(d) is reproduced as Appendix K to the certiorari petition.

1. Section 2254(d)(2) precludes relief on a challenge to the factual basis of a state court's merits adjudication if the state record would have allowed a rational fact-finder to determine the facts as the state court did.

a. Like § 2254(d)(1), see generally *Williams* v. *Taylor*, 529 U.S. 362 (2000), § 2254(d)(2) is a threshold provision that presumptively precludes habeas corpus relief entirely—it says "relief shall not be granted"—for claims adjudicated on their merits in the state court. Section § 2254(d)(2) deals specifically with collateral attacks founded on disputes about the facts on the basis of the state record—i.e., the precise kind of claim respondent Collins has raised in this case. See *Lambert* v. *Blackwell*, 387 F.3d 210. 241-242 (3d Cir. 2004). It applies in the case at bar, for the state court adjudicated respondent's *Batson* claim on the merits. And it states a standard naturally amenable to retrospective review of an extant body of evidence. Thus, (d)(2) allows respondent to avoid the outright bar on relief, and to then proceed to possible further inquiry into his *Batson* claim, only if the state adjudication was based on an "unreasonable determination of the facts in light of the evidence presented in the state court proceedings." See *Miller-el* v. *Dretke*, 125 S.Ct. 2317, 2325, 2340 (2005).

b. The "unreasonable determination" standard of (d)(2) defines an inquiry into whether any rational fact-finder could have found the facts as the state court did. The (d)(2) reasonableness standard conforms with that of (d)(1), which this Court has recognized to be more deferential than "clear error" review; and a *Jackson*-type standard naturally suggests itself as an expression a more-deferential inquiry into reasonableness in fact-finding.

First, the "*unreasonable* determination" standard for reviewing the state court determinations in (d)(2) provides the same level of review as is provided by the "*unreasonable* application" standard in the parallel (d)(1) provision setting forth the similar preclusive effect of state-court adjudications of

mixed questions of fact and law. Identical words in a section of a statute, of course, should be interpreted to bear the same meaning. *Estate of Cowart* v. *Niklos Drilling Co.*, 505 U.S. 469, 478 (1992).

Second, the "unreasonable application" standard in (d)(1)—and thus of (d)(2)—is even more deferential than the "clear error" standard of review that governs federal appellate review of the federal district court's fact-finding. This Court recognized that point in *Lockyer* v. *Andrade*, 538 U.S. 63, 74 (2003). Accord, *Williams* v. *Taylor*, 529 U.S. at 411. Nor would Congress require more scrutiny of mere state-court fact-finding than it prescribes for state-court rulings interpreting the scope of federal constitutional law. Even prior to AEDPA, state-court fact-finding historically had been accorded great deference where state-court rulings on federal law were accorded little or none, compare *Miller* v. *Fenton*, 474 U.S. 104, 112 (1985), with *Sumner* v. *Mata*, 449 U.S. at 598; and broad legal questions of constitutional law implicate a greater federal interest than case-specific findings of historical facts.

Third, the standard of "objective" unreasonableness under (d)(2) points to *Jackson* v. *Virginia*-like deferential review for rationality or reasonableness, and accords with both this Court's pre-AEDPA jurisprudence and the recognized purpose of AEDPA to further restrict the availability of the writ. This Court indicated in *Parke* v. *Raley*, 506 U.S. at 36, that *Jackson* represented a logical default alternative to the "fair support" or "clear error" inquiries into state court fact-finding. This Court's line of habeas corpus cases under *Teague* v. *Lane*, 489 U.S. 288, supports this view in informing the meaning of § 2254(d)(2).

The *Teague* doctrine generally precludes habeas corpus relief under § 2254 unless "no reasonable jurist" could have rejected the interpretation of the Constitution upon which the prisoner's claim was based. See *O'Dell* v. *Netherland*, 521 U.S. 151, 164 (1997) (whether "a reasonable jurist would have felt compelled"); *Lambrix* v. *Singletary*, 520 U.S. 518, 528, 538

(1997) ("whether "the unlawfulness of [petitioner's] conviction was apparent to all reasonable jurists"); *Graham* v. *Collins*, 506 U.S. 461, 477 (1993) (whether "all reasonable jurists would have deemed themselves compelled"). To be sure, this Court has cautioned that the "no reasonable jurist" standard does not imply that the petitioner will lose simply because "at least one of the Nation's jurists" in fact has disagreed with his contention. *Williams* v. *Taylor*, 529 U.S. at 409-410. Properly understood to avoid that pitfall, then, the *Teague* "reasonable jurist" standard inquires whether it is was "objectively unreasonable" for the state court to have rejected the petitioner's proffered interpretation of the law *Id.*; *O'Dell*, 521 U.S. at 156; *Stringer* v. *Black*, 503 U.S. 222, 237 (1992); see *Beard* v. *Banks*, 542 U.S. 406, 124 S.Ct. 2504, 2512 & n.5 (2004).

This *Teague* formula of "objective reasonableness" is reflected throughout 28 U.S.C. § 2254(d). It serves as a close proxy for the "clearly-established Federal law" standard in (d)(1). *Williams* v. *Taylor*, 529 U.S. at 409-410 ("With one caveat [restricting the source of law to Supreme Court jurisprudence], whatever would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law as determined by the Supreme Court of the United States' under § 2254(d)(1)"). And, the "unreasonable application of clearly-established Federal law" standard of (d)(1) also asks if an application of a constitutional rule is "objectively unreasonable." *Wiggins* v. *Smith*, 539 U.S. at 521; *Lockyer* v. *Andrade*, 538 U.S. at 75; *Williams* v. *Taylor*, 529 U.S. at 409-410. In light of the identical use of the term "unreasonable," the "unreasonable determination of the facts" standard in (d)(2) also involves the same kind of appraisal of "unreasonableness" as is provided in (d)(1).

c. The (d)(2) standard of heightened deference—review less intrusive than that of "clear error" and dependent upon the objective question of whether all reasonable decision-makers would have been compelled to agree with the habeas corpus petitioner—equates with the habeas corpus "any rational trier of

fact" standard described in *Jackson* v. *Virginia*, 443 U.S. 307. As with (d)(2), the *Jackson* test is an inquiry into reasonableness. See *id.* at 325. Under *Jackson*, the question on review is whether "no rational trier of fact could have found" the pertinent fact, under the applicable standard of proof, in light of the record produced at the trial. *Id.* at 324.

Review for reasonableness or rationality inquires whether any "substantial evidence" supported the trier of fact's determination. *Glasser* v. *United States*, 315 U.S. 60, 79 (1942); *People* v. *Johnson*, 26 Cal.3d 557, 576, 606 P.2d 738 (Cal. 1980); see *Powell* v. *United States*, 469 U.S. 57, 67 (1984); *Jackson* v. *Virginia*, 443 U.S. at 318-319 & n.12; accord, *United States* v. *Hedaithy*, 392 F.3d 580, 605 (3d Cir. 2004), cert. denied, 125 S.Ct. 1882 (2005); *United States* v. *Crenshaw*, 359 F.3d 977, 987-988 (8th Cir. 2004); *United States* v. *Wells*, 211 F.3d 988, 1000 (6th Cir. 2000); *United States* v. *Yousef*, 327 F.3d 56, 134 (2d Cir.), cert. denied, 540 U.S. 933, 993 (2003); *United States* v. *Shelton*, 325 F.3d 553, 557 (5th Cir.), cert. denied, 540 U.S. 916 (2003); cf. *Nance* v. *Norris*, 392 F.3d 284, 289 & n. 4 (8th Cir. 2005). The reviewing court does not "weigh the evidence" or "determine the credibility of witnesses." *Glasser*, at 79; cf. *Schlup* v. *Delo*, 513 U.S. 298, 330 (1995) ("under *Jackson*, the assessment of the credibility of witnesses is generally beyond the scope of review"). It views the record in the light most favorable to the determination of the fact-finder and presumes in support of it the existence of every fact that reasonably may be deduced from the evidence. *Jackson*, 443 U.S. at 325; *People* v. *Johnson*, at 576; see *Glasser*, at 79; *Sera* v. *Norris*, 400 F.3d at 538, 547 (8th Cir. 2005); *Hedaithy*, at 605; *Crenshaw*, at 997-988; *Wells*, at 1000; *Yousef*, at 134; *Shelton*, at 557.

d. Where the state court has adjudicated the applicant's constitutional claim on the merits, and that adjudication rests on state-court fact-finding that passes muster as rational, a habeas corpus attack consisting of a mere dispute about the facts disclosed by the state record must fail. For, under those

circumstances, § 2254(d)(2) mandates that "relief shall not be granted."

2. Section 2254(e)(1) requires that a state court finding be presumed correct; and that presumption cannot be overcome by re-weighing the evidence in a state-court record if that record would have permitted a rational fact-finder to determine the facts as the state court did.

a. Even if § 2254(d)(2) were deemed inapplicable because the state court did not adjudicate the prisoner's federal claim on its "merits," or for other reasons, a petitioner in respondent's shoes still would fail in any effort to rebut the automatic "presumption of correctness" for state-court fact-finding provided in § 2254(e)(1). Sections § 2254(d)(2) and (e)(1) represent "independent requirements." *Miller-el* v. *Cockrell*, 537 U.S. at 344. To prevail on a challenge to a state court fact determination, then, a state prisoner must overcome § 2254(e)(1) as well as (d)(2). See *id.* at 340, 348; *Wiggins* v. *Smith*, 539 U.S. 510, 528-529, 530; see also *Miller-el* v. *Dretke*, 125 S.Ct. at 2325, 2340.

b. Under § 2254(e)(1), which deals with discrete findings of fact as opposed to the threshold bar on relief governed by (d)(2), see *Miller-el* v. *Cockrell*, 537 U.S. at 341, a state court factual determination is automatically presumed to be correct. That the presumption now applies in every case is confirmed by the fact that, in enacting AEDPA, Congress deleted the list of exceptions found in the predecessor version of the provision. *Valdez* v. *Cockrell*, 274 F.3d 941, 950 (5th Cir. 2001), cert. denied 537 U.S. 883 (2002); see *Am. Nat'l Red Cross* v. *S.G.*, 505 U.S. 247, 263 (1992).

The burden now always devolves upon the prisoner to rebut the presumption not just with "convincing" evidence as in former § 2254(d) but with "clear and convincing evidence." That is an extremely heavy burden. As this Court indicated in *Schneiderman* v. *United States*, 320 U.S. 118, 135 (1943),

"clear and convincing evidence" may be said to leave the question in no doubt. Indeed, a popular defense-oriented treatise characterizes the presumption as "typically *relief-barring*." HERTZ & LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE (4th ed.) 825 (emphasis in original). In a case such as the one at bar—and indeed in virtually all cases in light of § 2254(d)(2) and the federal evidentiary-hearing restrictions in (e)(2), cf. *Williams* v. *Taylor*, 529 U.S. 420, 441-445 (2000)—any "clear and convincing evidence" determination would have to be made on the basis of the evidentiary record produced in the state court.

c. As the presumption no longer depends upon "fair support" for the finding in the state record, cf. former § 2254(d), a petitioner may not discharge his burden merely by second-guessing state-court fact-findings. Even under pre-AEDPA law, the federal habeas corpus court could not negate the presumption by merely re-evaluating the credibility of witnesses who appeared before the state court or by drawing different, non-necessary inferences from the same evidence considered by the state court. See pp. 16-21, *ante*. If such re-evaluation were not permitted as a way of forestalling the presumption in the first instance, it obviously could not have been employed as an appropriate means for ultimately overcoming the presumption under the "convincing evidence" provision. Indeed, the earlier presumption statute, former § 2254(d), contemplated new evidence in a federal "evidentiary hearing" as a means for doing that. Now, the presumption is unconditional and may be rebutted only by "clear and convincing evidence."

d. Congress' deletion of conditions or exceptions to the presumption, moreover, illuminates the direction in which Congress meant to move in § 2254(e)(1). In re-enacting and strengthening the presumption in different ways, Congress also had in mind this Court's earlier interpretations of the limits imposed on the federal court's power to defeat the presumption by re-determining the credibility of witnesses or by re-weighing the evidence on which the state court had made its own

determinations of fact. See *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978). Congress in AEDPA went even further—as it did in every other instance in which AEDPA changed the prior law governing habeas corpus for state prisoners by imposing "more, rather than fewer" limits on the availability of the writ.

Thus, § 2254(e)(1) further narrows the circumstances, if they ever existed, under which a habeas corpus applicant might defeat the presumption merely on the basis of the "cold" state court record—as respondent Collins here seeks to do. As noted above, even former § 2254(d) spoke of the applicant's opportunity to rebut the presumption in an "evidentiary hearing." It would be hard enough to meet the "clear and convincing evidence" burden based on new evidence in such a hearing. To meet that burden merely by re-arguing the facts based on the state court evidentiary record would be even harder.

As with the "relief shall not be granted" rule in § 2254(d)(2), the enhanced (e)(1) presumption, when attacked solely on the state record, cannot properly be said to be defeated by "clear and convincing evidence" if the state record contains "any substantial evidence" upon which "any rational trier of fact" could have found the facts as the state court did under the applicable burden of proof. As explained above, (d)(2) in such an instance would preclude relief on a fact-based challenge to a state court merits adjudication. Applying any more intrusive standard would risk treating § 2254(e)(1) anomalously as a relaxation rather than a tightening of the availability of the writ. And it makes sense to interpret (e)(1) as working, in the context of a case in which the petitioner offers no new evidence, in a way that comports with the way (d)(2) works.

Further, although (d)(2) applies only in cases in which the state court adjudicated the defendant's federal claim on its merits, the reality is that there will be few cases, if any, in which a state court will have undertaken fact-finding with respect to a claim without also adjudicating the claim on its merits under (d)(2). There will be fewer cases still in which the petitioner

then might come to federal court to attack such freestanding fact-finding under (e)(1) without seeking and qualifying for an evidentiary hearing to offer "clear and convincing" nature in rebuttal. Cf. § 2254(e)(2).

e. Moreover, where the state court record provides rational support for the state-court findings, it would be at best exceedingly doubtful, and perhaps logically impossible, for a federal court to nevertheless draw from that same record the powerful conclusion that "clear and convincing evidence" actually had refuted the state court's contrary but rational factual determinations. To do so in a case in which the state fact-finding is supported by a rational basis, one would have to maintain simultaneously the irreconcilable beliefs that a rational fact-finder made a determination based on reasonable support in the record but nevertheless ignored an opposite conclusion compelled by clear and convincing evidence.

f. Respondent Collins might argue that *Wiggins* v. *Smith*, 539 U.S. 510, and *Miller-el* v. *Dretke*, 125 S.Ct. 2317, indicate that this Court under AEDPA has engaged in a greater level of scrutiny of state-court fact determinations than the *Jackson* v. *Virginia* type of rationality standard would permit. And he might note that this Court in *Miller-el* v. *Cockrell*, 537 U.S. at 340, in the context of a discussion regarding § 2254(d)(2) and (e)(1), indeed stated that "[d]eference does not imply abandonment or abdication of judicial review" and that "[a] federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." 537 U.S. at 340. But neither these statements, nor the results in *Wiggins* and *Miller-el v. Dretke*, are inconsistent with the State's argument.

i. The State does not claim that AEDPA deference means, or approaches, abdication. It would be hard to characterize the *Jackson* "substantial evidence" and "rational trier of fact" standard—which this Court has deemed adequate on habeas corpus to support a criminal conviction and findings required to

send a defendant to his death, see *Lewis* v. *Jeffers*, 497 U.S. at 781—as an abandonment or abdication of judicial review. Nor would it be correct to say that defendants and habeas corpus petitioners never prevail on claims governed by the *Jackson* standard. See, e.g., *Chien* v. *Shumsky*, 373 F.3d 978, 993 (9th Cir. 2004) (en banc); see also *Schlup* v. *Delo*, 513 U.S. at 330 ("under *Jackson*, the assessment of the credibility of witnesses is *generally* beyond the scope of review") (emphasis added). Prior to *Jackson*, the federal courts applied an even more forgiving standard of "any evidence" to claims now governed by the "rational fact-finder" test promulgated in *Jackson*. See *Thompson* v. *Louisville*, 362 U.S. 199 (1960). And, in light of AEDPA, *Jackson* review of the sufficiency of evidence to support a criminal conviction might yet come to reflect a more-forgiving measure of "double deference" such as that accorded to ineffective-counsel claims. See *Yarborough* v. *Gentry*, 540 U.S. 1, 6 (2003) (*per curiam*); *Juan H.* v. *Allen*, 408 F.3d 1262, 1274-1275 & n.13 (9th Cir. 2005); *Hurtado* v. *Tucker*, 245 F.3d 7, 14-19 (1st Cir. 2001). So the "any rational trier of fact" component of *Jackson* hardly represents the nadir of judicial scrutiny.

ii. *Wiggins* v. *Smith*, 539 U.S. 510, is quite reconcilable with the "substantial evidence" test and the "any rational fact-finder" standard reflected in *Jackson*. This Court in *Wiggins* rejected a state court factual determination, that defense counsel in a capital case had learned of crucial "mitigation" information from certain public documents, because the documents themselves were part of the record and absolutely demonstrated on their face that they contained no such information. 539 U.S. at 528. Where the state court record completely refutes the state finding in this way, the state's determination properly may be deemed "unreasonable" and disproved by "clear and convincing evidence."

It is true that, in rejecting the state court finding, the *Wiggins* court described that finding as a "clear factual error" and as "clearly erroneous." But it is highly doubtful that *Wiggins*

meant, by these spare phrases, to resolve the unmentioned issue of whether the "clear error" standard applies under § 2254. In *Lockyer* v. *Andrade*, 538 U.S. at 75, as noted above, this Court earlier had explicitly addressed the closely-related question of whether the familiar "clear error" applied in § 2254(d)(1) and concluded that it did not; it would be unpersuasive to argue that this Court then reached the opposite conclusion in (d)(2) without even discussing it. Moreover, *Wiggins* already had determined that the state court's evaluation of defense counsel's investigation otherwise had failed to pass muster under § 2254(d)(1); the Court's statement about clear error was not necessary to the decision. 539 U.S. at 528-529.

iii. Nor does *Miller-el* v. *Dretke*, 125 S.Ct. 2317, conflict with the State's argument in support of an "any rational trier of fact" test here. It was not made explicit what precise standard *Miller-el* v. *Dretke* brought to bear on the question of why the state's determination in that case was "unreasonable" under § 2254(d)(2) and rebutted by "clear and convincing evidence" under (e)(1). So it cannot be said that any formulation of the Court's standard in that case conflicts with that urged by the State in this case. Certainly, the Court in *Miller-el* v. *Dretke* never asserted that it was granting relief even though the record would have allowed a rational fact-finder to credit the prosecutor's jury challenges under *Batson*. Thus, the result in *Miller-el* does not reflect a wholesale or *sub silentio* retrenchment from the deference historically accorded to state-court fact-finding and now strengthened in AEDPA. To the contrary, given the "remarkable" pattern of jury strikes, the comparative analysis of jurors that the Court deemed "powerful," and the "confirming" evidence of historical practices and policies that provided the race-based explanation for suspicious and unexplained practices in Miller-el's case, the *Miller-el* v. *Dretke* opinion indicates that this Court had determined that no rational fact-finder could have rejected the inference of race discrimination in that case.

Although the Court acknowledged that "some" of the evidence was "open to judgment calls," the evidence of many of the individual tactics employed by the prosecutors appears to have pointed only toward a finding of discrimination. For example, the prosecutors had peremptorily dismissed ten of eleven African-American jurors; they had asked trick questions, meant to induce disqualifying answers, to 100% of the African-American panel members; they had repeatedly "shuffled" the waiting list when it appeared that African-American jurors were next to be called to the jury box; and they had taken the trouble to mark for no innocent reason apparent in the record, the race of the jurors on their juror cards. *Miller-el* v. *Dretke*, 125 S.Ct. at 2333, 2339. Further, the Court characterized the prosecutors' stated explanations as "implausible," "unsupportable," and "incredible," and opined that "there was no good reason to doubt" that they were pretexts for race discrimination. *Id.* at 2328, 2332, 2339. In other respects, the Court held that the race-based motives of the prosecutor, insofar as they might have appeared only probable in light of certain evidence standing alone, were ultimately "confirmed" by other evidence of the prosecution office's "policy" of excluding African-Americans from juries. *Id.* at 2332. Thus, the Court ultimately explained that "when the evidence on the issues is viewed cumulatively *its direction is too powerful to conclude anything but discrimination*." *Id.* at 2339 (emphasis added).

In addition, *Miller-el* v. *Dretke* indicated that the degree of deference accorded to the state trial judge might have been affected in the Court's estimation by a unique three-year delay between the jury selection and the later proffering of reasons by one of the prosecutors for the challenged conduct. 125 S.Ct. at 2323, 2326 n.1. Also, it is not certain that *Miller-el* limited its analysis to the self-same evidence that was before the state court—as respondent and the Ninth Circuit are limited in the case at bar. *Id.* at n. 8. In any event, *Miller-el* v. *Dretke* illustrates that a habeas corpus petitioner bears an extremely heavy burden when he seeks to argue, under § 2254(d)(2) or

(e)(2), that the state record contains no rational support for the state court's findings and "clear and convincing" evidence of the opposite.

3. In the alternative, the federal court must review very deferentially the state-court fact findings attacked by respondent; and, in any event, it may not reject them unless the state court's decision was not only insufficiently supported but "clear and convincing" evidence establishes that the state finding was wrong.

a. Even if it were assumed that habeas corpus review of state factual determinations is not as deferential as *Jackson* v. *Virginia*-type review, AEDPA and this Court's precedents require that federal review in this area be, if not stricter, then at least no more intrusive than "clear error" review. As this Court explained in *Marshall* v. *Longberger*, 459 U.S. 422, federal habeas corpus courts should not subject state court findings of fact to less deference than they accord to federal district court findings. And, as noted above, "clear error" review for *Batson* claims was endorsed in *Hernandez* v. *New York*, 500 U.S. at 366-369, even for cases on direct rather than collateral review from the state courts. There could be no convincing basis for a more intrusive level of federal scrutiny.

b. Finally, because the presumption is now automatic and the "fair support" condition has been eliminated, a mere lack of evidence to support an affirmative finding by the state court does not end the inquiry under § 2254(e)(1). Regardless of whether a state court finding were deemed untenable for the distinct purpose of § 2254(d)(2), the automatic § 2254 (e)(1) presumption still would require that the prisoner in any event establish the incorrectness of the state-court finding by "clear and convincing evidence."

II.

Because a rational fact-finder applying the appropriate standard of proof could have determined that the prosecutor in fact had challenged Juror 16 for race-neutral reasons, the state court's findings to that effect were binding on the Ninth Circuit and required dismissal of respondent's *Batson* claim.

The record in this case provided the requisite rational support for the factual determinations made by the state court in applying the criteria set out in *Batson* v. *Kentucky*, 476 U.S. 79. It also provided enough support to pass muster under a "clear error" standard. See *Hernandez v. New York*, 500 U.S. at 366-369; *id.* at 372 (O'Connor, J., concurring). Indeed, the record makes it clear that the prosecutor did not engage in any discrimination proscribed by *Batson* and its progeny.

Under *Batson*, a prosecutor's use of peremptory challenges to remove a juror based on race violates the Equal Protection Clause. This Court has outlined, at least for purposes of trial and direct appeal, a "three-step process for evaluating such a *Batson* claim. First, the defendant must make a prima facie showing—that is, raise an inference—that the prosecutor has challenged a juror or jurors based on race. *Johnson* v. *California*, 125 S.Ct. 2410, 2418-2419 (2005). Second, if the showing has been made, the prosecutor must articulate a race-neutral reason for the challenges. Third, the trial judge must then determine whether, under all the circumstances, the defendant has carried his ultimate burden of proving racial discrimination. See *Hernandez* v. *New York*, 500 U.S. 352, 358-359 (1990) (plurality opinion). A finding of whether a prosecutor intentionally discriminated is a finding of fact. *Miller-el* v. *Dretke*, 125 S.Ct. at 2325; *Hernandez*, at 364-365; see *Batson* v. *Kentucky*, 476 U.S. at 98 n.21.

A. The record provides substantial evidence affording rational grounds for the finding that the prosecutor challenged Juror 16 for reasons other than race.

1. Resolution of the factual question implicating § 2254(d)(2) and (e)(1)—whether the state court record supported the state-court determinations that the prosecutor in her own mind had challenged Juror 16 for race-neutral reasons—should have been simple for the Ninth Circuit. From the beginning, any initial inference of discrimination was weak. See *Hernandez* v. *New York*, 500 U.S. at 370 (plurality op.). The prosecutor had challenged only two non-African-Americans and two African-Americans. And the prosecutor's reason for challenging Juror 19—her naive statements about her daughter's drug use—were obviously well-founded; indeed, respondent abandoned his objection to it in the state appeal long ago. Moreover, the charged drug-possession crime had no identifiable "victim" different from respondent's race.

When directly asked about Juror 16, the prosecutor readily explained that she had exercised the peremptory challenge because of Juror 16's youth and unmarried status and what that might imply—i.e., a possible lack of community ties and tolerance of drug usage in a recidivist prosecution for possession of a small amount of drugs—and because of the juror's specifically-described disrespectful eye-rolling conduct in the jury box. These were hardly "implausible" or "fantastic" justifications, see *Purkett* v. *Elem*, 514 U.S. at 768, that would have compelled a rational fact-finder to discredit them. To further support her explanation, the prosecutor noted that she also had challenged an identified white juror on account of youth, single-status, and "no ties."

The judge recognized that the challenged juror and the identified white juror indeed were young. Defense counsel did not dispute the accuracy of the prosecutor's statements or their relevance to Juror 16. Because the judge conducted the voir dire, defense counsel hardly could complain that the prosecutor

had asked manipulative questions of the jurors; and she never identified any comparable non-African-American jurors treated differently by the prosecutor. Then, having questioned the prosecutor further, listened to the prosecutor's explanation, and observed the prosecutor's demeanor, the judge overruled respondent's objection.

As this Court has observed,

> In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. *There will seldom be much evidence bearing on that issue, and the best evidence will often be the demeanor of the attorney who exercises the challenge.* * * * [E]valuation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province." *Wainwright* v. *Witt*, 469 U.S. 412, 428 (1985), citing *Patton* v. *Yount*, 467 U.S. 1025, 1038 (1984).

Hernandez v. New York, 500 U.S. at 365 (plurality op.). Such was the case in respondent's trial.

2. This case is close to polar opposite of *Miller-el* v. *Dretke*, 125 S.Ct 2317. There, the prosecutors had peremptorily challenged ten of the eleven available African-American jurors, so that "[h]appenstance [was] unlikely to produce this disparity." *Id.* at 2327. Here, as noted, the prosecutor challenged only two African-Americans and two non-African-Americans; there was no showing in the record how many African-Americans remained in the venire; and, at the time of the *Batson* challenge, one or two African-Americans remained in the jury box. In *Miller-el*, the prosecutors engaged in an extraordinarily high rate of disparate questioning of African-Americans and non-African-Americans, and in a suspicious and otherwise unexplained pattern of "jury shuffling" that rendered it less likely the African-Americans would serve. *Id.* at 2332-2338. Here, in contrast, the judge rather than the lawyers

carried out the voir dire. Nor did respondent ever fairly present to the State court any allegation that the prosecutor had failed to strike similarly-situated non-African-American jurors. Cf. *id.* at 2336-2340 & n.2. Finally, in *Miller-el*, there was a documentary history of discriminatory practices and procedures in the prosecutor's office that "confirmed" the race-basis of the prosecutors' suspicious and unusual tactics. But nothing like that evidence was produced by respondent in this case.

B. Any contrary circumstantial evidence was insignificant; and, by choosing to accept such evidence as true, the Ninth Circuit completely failed to accord the state courts the deference mandated by AEDPA.

The two-to-one majority on the Ninth Circuit panel improperly accorded no deference to the state courts' *Batson* rulings in this case. As the dissenting opinion and the later five-judge dissent from rehearing aptly discerned, the panel majority merely "substitute[d] its own inferences drawn from the cold record for the perspectives of the trial court and the state appellate court" and then improperly "insist[ed] that any perspective other than its own must be unreasonable."

1. The Ninth Circuit's departure from AEDPA and the rule of deferential review is obvious, first, in its implacable attitude toward the prosecutor's statement that, as she had done with African-American Juror 16, she also had challenged white Juror 6 on account of his youth and lack of community ties. The panel majority disbelieved the prosecutor simply because it perceived a possible different reason for the prosecutor's challenge to Juror 6. Even under "clear error" review, less deferential to the states than the standard the State presses here, the federal court should not have chosen to accept this view of the evidence over a permissible view that supports the state court ruling. See *Anderson* v. *Bessemer City*, 470 U.S. at 574.

2. The Ninth Circuit panel's hostile "gotcha" attitude is also apparent in its treatment of what six other Ninth Circuit judges

understood was merely an accidental reference by the prosecutor at one point to Juror 16 and "Juror 019"—rather than Juror 16 and "Juror 006". When asked for her explanation, the prosecutor discussed challenged Juror 16 and then challenged Juror 19 in sequence. In first discussing African-American Juror 16, the prosecutor noted that she had challenged both Juror 16 and white Juror 6 on account of their youth and her resultant concerns about drug-use tolerance and her concerns that they were "single" with no community "ties." Then, separately discussing her reasons for challenging Juror 19, the prosecutor spoke solely about that juror's puzzling statements about her daughter's cocaine problem.

Certainly, the prosecutor would have discerned no advantage in baldly attempting to portray Juror 19, the retiree grandmother with seven children, as too young and thus raising the concerns she had mentioned with respect to Juror 6 and 16. That the prosecutor made no attempt to mislead the court in this way is confirmed by the fact that she was engaged, at almost the very same moment, in explaining that she had challenged Juror 19 based upon that juror's statements about her adult daughter's drug use.

This Court has instructed federal habeas corpus courts not to rush to impose malign constructions on the remarks of prosecutors, see *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 647 (1974), and to guard against a "readiness to attribute" error" in AEDPA review of state court decisions. *Woodford* v. *Visciotti*, 537 U.S. 19, 23 (2003) (*per curiam*). Yet the Ninth Circuit seized upon the prosecutor's simple mistake to draw the exaggerated and improbable conclusion that her peremptory-challenge explanations therefore could not be trusted as honest. JA 54-55. It then employed that strained conclusion in upsetting the fact-finding of the state judge who had believed the prosecutor after observing her with his own eyes.

3. The panel majority was wrong, again, in rejecting the prosecutor's race-neutral explanation that she had excused Juror 16 on account of concerns associated with her youthfulness.

The majority recognized, correctly, that challenging a juror based on youth does not offend the Equal Protection Clause. JA 45; accord, *United States* v. *Jackson*, 983 F.2d 757, 762 (7th Cir. 1993); *People* v. *Sims*, 5 Cal.4th 405, 430, 853 P.3d 992 (Cal. 1993). Perhaps more to the point in this AEDPA case, this Court has never held that a juror's youth is an impermissible criterion for peremptory challenges. So the state courts, in accepting the juror's youthfulness as a valid basis for the strike, did not rule "contrary to" or "unreasonably" apply any "clearly established Federal law" under 28 U.S.C. § 2254(d)(1).

a. Despite this, the panel majority unnecessarily and impermissibly rejected the prosecutor's race-neutral concerns about Juror 16's youthfulness. The first of the panel's reasons is patently unrealistic. Because the prosecutor had explained that youthful jurors such as Juror 16 lacked "ties to the community" and might be "too tolerant" of drug usage, the panel apparently concluded that the prosecutor's challenge somehow had not been based on the juror's young age at all. JA 48. For this same reason, it was wrong for the panel to suggest that the state courts unreasonably had "glossed over" this "clarification" of the prosecutor's actual or stated reasons.

b. Second, the panel rejected the prosecutor's asserted beliefs on these youth-related points as pretextual because the record did not prove them to be true about Juror 16 personally, and as impermissible because they were not "relevant" or "clear and specific." JA 46-52. Here, again, the panel's conclusion was improperly adversarial, strained, and unnecessary. Further, in requiring that the record prove that the prosecutor's assumptions about youthfulness specifically applied to Juror 16 personally, the panel's analysis radically departs from the limited inquiry into peremptory-challenges tactics authorized by this Court's *Batson* jurisprudence.

Batson and its progeny express condemnation of peremptory challenges based on race, ethnicity, or sex. See *J.E.B.* v. *Alabama ex rel T.B.*, 511 U.S. 127 (1994); *Hernandez* v. *New York*, 500 U.S. at 355 (plurality op.). Discrimination on such

grounds is subjected to heightened judicial scrutiny under the Equal Protection Clause. See *J.E.B.*, at 140-141 fns. 11-13 (1994). The *Batson* cases have not held it improper to exercise peremptory challenges base don on race-, ethnicity-, or gender-neutral reasons. In any event, they do not "dictate" or "clearly establish," for purposes of the retroactivity doctrine of *Teague* v. *Lane* and the deference standard of 28 U.S.C. § 2254(d)(1), that it is unconstitutional to exercise jury challenges based assumptions about prosaic or transitory characteristics that are not "likely to stigmatize as well as to perpetuate historic patterns of discrimination" against people in "suspect classifications." See *J.E.B.*, at 1427 n. 11.

Thus, although trial judge is not compelled to accept them, the *Batson* cases allow for honest reliance on characteristics such as a juror's long hair or other "silly" or "superstitious" reasons. See *Purkett* v. *Elem*, 514 U.S. 765, 768-769 (1995) (*per curiam*). Because youthfulness is not an unconstitutional criterion for a peremptory challenge, the prosecutor in this case was entitled to honestly rely on such reasons. Even more obvious, she was entitled to rely on reasons that were sensible rather than silly or superstitious. Here, the prosecutor's challenge was lodged in the context of a Three Strikes Law prosecution of a defendant for simple possession of a small amount of cocaine. A prosecutor rationally might believe that prosecution of such an offense might seem unjustified or unimportant to youthful people who might tend to have more permissive attitudes about drugs, or to young and single people with no long-standing stake in the community. Accordingly, she honestly might wish to exclude them or reduce their presence on the jury so as to maintain a critical mass of older jurors who reasonably might tend to present a contrary view for consideration during jury deliberations. *Batson* does not proscribe reliance on "any number of bases on which a prosecutor reasonably might believe that it is desirable to strike a juror who is not excusable for cause." *Miller-el* v. *Dretke*, 125 S.Ct. at 2324.

c. Third, the Ninth Circuit characterized the prosecutor's reasons in this regard as not "clear and specific" or "related" to the case. JA 46-52. In doing this, the panel ignored this Court's explanation that its *Batson* warning about the need for the prosecutor to give clear and specific reasons "related to the particular case to be tried,"

> was meant to refute the notion that a prosecutor could satisfy his burden of production by merely denying that he had motive or by merely affirming his good faith. What it means by a "legitimate reason" is not that makes sense, but a reason that does not deny equal protection.

Elem, 514 at 768-769. Thus, in the context of this case, "[a] neutral explanation * * * means an explanation based on something other than the race of the juror." *Hernandez* v. *New York*, 500 U.S. at 360. If the proffered race-neutral reason is found to be genuine and honest, then the defendant will have failed to prove his *Batson* claim of racial discrimination. *Id.* at 367.

To put it another way: insofar as the Ninth Circuit panel at various points seemed to accept the view that the prosecutor's true reason for challenging Juror 16 was not youth but "drug-use tolerance," and "lack of community ties" see JA 48, its necessarily concluded not only that the prosecutor's reason was proper in that it was race-neutral on its face and the true and honest reason in fact. Similarly, under the version of events adopted by respondent in the California Court of Appeal, the prosecutor dismissal of Juror 16 for the sole reason of youth did not give rise to a *Batson* violation.

4. Nor—notwithstanding the unnecessary adverse inference the Ninth Circuit panel chose to draw—did the record compel any conclusion that the prosecutor's peremptory challenges had been based on the jurors' sex. The prosecutor had exercised her second peremptory challenge against Juror 6, a man, at a time

when there was a clear predominance of women jurors in the box. See JA 100-160 et seq. When first asked by the judge to give her reasons, the prosecutor's specific explanations about the characteristics of Jurors 16 and 19 included no mention of their sex as a reason for her peremptory challenges. RT 67.

It is true that, when later asked by the judge for further comments, the prosecutor indeed mentioned their sex—but not as a reason for their dismissal. Instead, the prosecutor mentioned the sex of the two challenged jurors, and the sex of the defendant and of another juror, as part of an argument offered to forestall any claim or conclusion that she somehow might have been engaged in a course of conduct to excuse jurors of the defendant's male sex and to remind the judge that she had not exercised any challenge against other African-American people, including another African-American woman, still in the jury box. RT 68. It was in this context that the prosecutor broadly referred to case law "for those types of reasons as being upheld in other courts, age and gender and inexperience with a certain subject area." The reasons she had most recently discussed for excusing Jurors 16 and 19 concerned age and inexperience; and the arguments she offered for why her reasons should be credited in part concerned the absence of any attempt on her part to purge the jury of either African-American males or African-American females.

Still later, when the judge asked the prosecutor for case law supporting the notion that peremptory challenges may be exercised on the basis of sex, the prosecutor merely answered the judge's question without ever adopting the premise that she had acted on such a basis. In her remarks to the judge in response to his questions about sex being a "suspect classification," the prosecutor continued to speak of justifications such as "youth" and "ties in the community" and, if anything, seemed somewhat oblivious to any possibility that she had ever offered the fact of Juror 16's or Juror 19's sex as a reason for her peremptory challenges. RT 70-71.

At the end of the discussion, the trial judge remarked, "I don't see, Ms. [Prosecutor], that you are seeking to justify excusing people of one ethnicity based on their gender." RT 71. It might be argued that the judge's added comment—"I don't think that is going to cut it"—introduced some uncertainty about his views. But any such uncertainty would hardly support an affirmative conclusion that the judge actually had found the jurors' sex to have been a reason for the prosecutor's challenges. For, without ever mentioning such a thing, let alone purporting to find that the prosecutor actually had relied on the jurors' sex as her reasons for the challenges, the judge in his ultimate ruling instead accepted the prosecutor's invocation of youth and demeanor as the prosecutor's reasons for challenging Juror 16 and her invocation of the second juror's "experiences with a family member who had a drug problem" as the prosecutor's reason for challenging Juror 19. RT 71.

The Ninth Circuit's conclusion that the prosecutor in some way relied on the challenged jurors' sex in exercising her peremptory strikes, accordingly, was based on a record that, at most, was too ambiguous to sustain that conclusion even under a simple preponderance-of-evidence standard. Still less does the record sustain such a conclusion under the "clear and convincing evidence" and "unreasonable determination of the facts" provisions of 28 U.S.C. § 2254(d)(2) and (e)(1).

Even if the evidence somehow clearly and convincingly showed that the prosecutor in fact had relied to some degree on the jurors' female sex as a reason for her challenges, the state courts' rejection of respondent's *Batson* claim still would not be assailable under § 2254(d) as either "contrary to"or an "unreasonable application of" the jury-challenge legal doctrine "clearly established" in the holdings of this Court's *Batson* line of cases. There has been no finding that the prosecutor's cited reasons of youth and demeanor—much more prominent in the record of the discussion—would not have prompted her to challenge Juror 16 anyway. See generally *Kesser* v. *Cambra*, 392 F.3d 327, 337 (9th Cir. 2004).

In any event, this Court has not held that mix[ed motives, some proper and some improper, render a litigant's peremptory challenge of a juror unconstitutional. See *Rico* v. *Leftridge-Byrd*, 340 F.3d 178, 185 (3d Cir. 2003) ("The Supreme Court has not yet addressed mixed motives in jury selection"). In *Batson*, this Court only invalidated strikes based "solely" on race. 479 U.S. at 88; see *Hernandez* v. *New York*, 500 U.S. at 373-374. To grant retroactive relief by "extending" *Batson* a further step to cover a strike merely because the prosecutor's motive allegedly might have been mixed in this circumstances of this case would violate both § 2254(d)(1) and the *Teague* v. *Lane* anti-retroactivity doctrine. See *Yarborough* v. *Alvarado*, 541 U.S. 652, 666 (2004); *Caspari* v. *Bohlen*, 510 U.S. 383, 396 (1994).

5. Next, the panel incorrectly suggested that the state court unreasonably had failed to consider evidence that the prosecutor had eschewed challenging Juror 15, whom the panel portrayed as "a white juror who possessed the same objective characteristics as Juror 16." JA 50. The panel did not explain why the state court would have been required to conclude that Juror 16 was white or even that she was not African-American. Nor was it tenable for the panel majority to suggest that Jurors 15 and 16 should have seemed similarly situated in the prosecutor's view—for it was only Juror 16 who engaged in the disrespectful eye-rolling in response to the judge's comments. Nor could such a comparison be compelling in the context of this case, where the number of peremptory challenges and the number of challenges to African-American jurors was low, and where there was no evidence of other suspicious tactics. Cf. *Miller-el* v. *Dretke*, 125 S.Ct. at 2325, 2332-2340.

Even if the prosecutor had struck Juror 15 too, it is doubtful that it would have satisfied a court that approached the record without appropriate deference, as the panel majority in this case did. Its treatment of a comparable situation shows this. As noted above, when the prosecutor explained that she had not challenged youthful white Juror 6 for the same reason she

applied to Juror 16, the panel chose to disbelieve her anyway, simply because there might have been some other respect in which the two jurors differed. Ironically, to the extent "comparative analysis" might reveal anything in this case, a comparison of the panel's own treatment of Jurors 15 and 16 on the one hand, and Jurors 6 and 16 on the other, illustrates the inappropriate eagerness to find error that pervades the Ninth Circuit opinion.

Even if the juror comparisons were relevant, there still would be no basis to say that the state court had acted "unreasonably" by "failing to consider" the evidence in this regard. In *Early* v. *Packer*, 537 U.S. 1, 9 (2002) (*per curiam*) this Court summarily rejected the Ninth Circuit's similar attempt to rely, as a purported justification for refusing to defer to a state court ruling under § 2254(d), on the absence of an explicit statement by the state court that it had considered the impact of certain evidence. In reversing this Circuit's decision summarily, as it has done in other Ninth Circuit AEDPA decisions that failed to defer to the state courts, this Court explained that the state court need not issue such a "formulary statement." Accord, *Miller-el* v. *Cockrell*, 537 U.S. at 347 (no need for "detailed findings addressing all the evidence"). Section 2254(d)(2), of course, speaks of reasonableness not as a function of state fact-finding and fact-explaining *procedures* but of the "*evidence* presented in the State court proceedings" instead.

The *Packer* rule is particularly apt here: for respondent never mentioned anything to the state trial judge or to the state court of appeal about what the comparative analysis of the struck and non-struck jurors, subsequently undertaken for the first time by the Ninth Circuit, would show. Indeed, in the state appeal, the premise of respondent Collins' argument was that the prosecutor indeed had challenged Juror 16 for the non-racial reason of youth.

6. Finally, the panel erred in ruling that the state appellate court had engaged in an "unreasonable determination of the facts" under § 2254(d)(2) in ruling that nothing in the record

showed that the trial judge had failed to approach his *Batson* duty appropriately. JA 59-61. It is hard to discern whether this criticism is an argument about what facts the evidence proved or whether the state judge's undisputed method of conducting the peremptory-challenge inquiry was inadequate as a matter of law under *Batson*. Either way, the critique fails.

The record shows that the trial judge conscientiously carried out *Batson*'s essential requirements. Upon the defense objection, the judge ascertained whether there was a prima facie case of discrimination. The judge's attentiveness to *Batson* concerns is illustrated quite clearly by the fact that, although he had discretion to decline to find a prima facie case, he instead found one and precipitated a hearing outside the jury's presence. In that hearing, he asked for the prosecutor's reasons, as *Batson* provides. He followed up with further questions that challenged the prosecutor and reflected an understanding of the *Batson* line of case. He invited and heard the defense's argument. Defense counsel never claimed that she had not observed Juror 16's "eye-rolling," and never denied that it had occurred. In the end, the judge recognized the race-neutral nature of the prosecutor's reasons, forthrightly noted that he had not seen the challenged facet of Juror 16's cited demeanor, and ruled that he was giving the prosecutor the benefit of the doubt—a resolution that is completely compatible with *Batson*, which places and keeps the burden of proof on the party seeking to prove discrimination. See *Johnson* v. *California*, 125 S.Ct. at 2417.

As Judge Bea cogently explained in his dissenting opinion in this case,

> The panel opinion concluded, irrationally, that because the trial judge did not see the eye-rolling, the state appellate court was unreasonable in approving the prosecutor's strike. * * * * [I]t does not matter whether the state trial judge noticed the eye-rolling, or even whether there actually was any eye-rolling. All that matters is whether the prosecutor intentionally lied about the eye-rolling to make an excuse for getting an African American woman off the jury. If the prosecutor was really striking Juror 016 because she thought the juror rolled her eyes and not because she was African American, she had a right to strike her, even if she was mistaken about whether the eye-rolling actually occurred. In this case, the trial judge thought the prosecutor was telling the truth, and the state appeals court saw no reason to doubt it.

JA 9.

Under the rational fact-finder standard reflected in *Jackson* v. *Virginia*, 443 U.S. at 319, the court must the evidence in the light most favorable to the State. Under any recognized deferential standard, the state court's findings here must stand.

C. The state court determination validating the prosecutor's non-racial motives is binding in federal court, so there is no basis for concluding that the state court's rejection of respondent's *Batson* claim was "contrary to" or an "unreasonable application" of *Batson*, or that respondent's rights were violated.

The state court's finding accepting as truthful the prosecutor's stated reasons for excusing Juror 16 sounds the death knell for respondent's *Batson* claim. See *Hernandez* v. *New York*, 500 U.S. at 367. The Ninth Circuit's circumvention of § 2254(d)(2) and (e)(1)'s requirements of deference to state court fact-finding cannot be condoned.

The State, of course, agrees with this Court that racial discrimination in jury selection is wrong not just because of the violation of trial rights and the harm to minorities, but also because it damages public respect for and confidence in the judicial system. *Miller-el* v. *Dretke*, 125 S.Ct. at 2323-2324. Precisely because of the welcome consensus that race discrimination is wrong, the effect of a judicial finding of such

discrimination can have a toxic effect on a prosecutor's reputation, and can itself foster belief that racism pervades the jury-selection process. A court therefore also has an obligation to ensure that its finding of racial discrimination under *Batson* is well-founded. The Ninth Circuit failed in that obligation and in its obligation to respect the state courts under AEDPA.

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals should be reversed.

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